

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

JAMES K. ARRINGTON,  
  
Debtor.

No. 01-20005  
Chapter 7

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MARY FOIL RUSSELL, Trustee,  
  
Plaintiff,

vs.

Adv. Pro. No. 02-2002

HOLLISTON MILLS EMPLOYEE  
CREDIT UNION,  
  
Defendant.

**MEMORANDUM AND ORDER**

APPEARANCES :

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Employee Credit Union*

MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the chapter 7 trustee seeks to avoid pursuant to 11 U.S.C. § 547 the perfection of a security interest in an automobile which occurred more than 20 days after creation of the interest. Presently before the court is the defendant's motion for summary judgment based on the contention that no transfer of the debtor's property occurred within the preferential period because the automobile was owned solely by the debtor's former wife. The court agrees and will accordingly grant the defendant's motion. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(F).

The debtor James K. Arrington filed for bankruptcy relief under chapter 7 on January 2, 2001. Listed on Schedule B – Personal Property was an interest in a 1999 Chevrolet Malibu automobile. On January 4, 2002, the chapter 7 trustee filed a "Complaint To Avoid Lien," commencing the present adversary proceeding against the defendant Holliston Mills Employee Credit Union. The trustee alleges in the complaint that the debtor became indebted to the defendant in the principal amount of \$14,801.75 by the execution of a promissory note and security agreement dated May 14, 1999, for the purchase of the 1999 Chevrolet Malibu automobile. The trustee further alleges that the debtor and the defendant did not apply for a certificate of title for this automobile until December 13, 2000, and that

therefore, the defendant's security interest was not perfected until that date. Accordingly, the trustee asserts that the perfection of the security interest was a preferential transfer avoidable under § 547(b).

In its answer to the complaint, the defendant alleges that "the subject vehicle was not property of the estate of the Debtor [because] pursuant to a divorce settlement and decree entered and filed on June 2, 2000, the vehicle was ordered by the Law Court for Sullivan County at Kingsport, Tennessee in Civil Action No. C33467 (B) to be transferred to a Third Party, Mary Colleen Arrington." Attached to the answer are copies of the application for title and the title itself which lists Colleen Arrington as the registered owner and the defendant as lienholder.

The motion for summary judgment filed by the defendant on August 29, 2002, is based on the lack of ownership of the automobile by the debtor. In support of its summary judgment motion, the defendant has tendered the affidavits of the debtor and Brenda Laws, the manager of the defendant. Attached to the debtor's affidavit is a final decree of divorce between Mary Colleen Arrington and James Kyle Arrington filed June 2, 2000, and a Divorce Settlement Agreement incorporated into the divorce decree. The debtor states in his affidavit that "[a]s a part of

the property settlement in the divorce, I agreed to give the 1999 Chevrolet to my wife, Colleen Arrington, and I was to pay the balance owed to the Credit Union. I mistakenly listed this car as mine on my bankruptcy papers, because I knew I would be reaffirming and paying this debt owed on the car as agreed in the divorce." Consistent with the affidavit, paragraph 8 of the Divorce Settlement Agreement provides in part that "Wife shall be awarded the 1999 Chevrolet Malibu automobile, titled in the names of the parties, encumbered to the Credit Union at ICG Hollison, in the approximate amount of \$13,000.00. Husband shall be financially responsible for the indebtedness against said automobile and shall hold Wife harmless therefrom."

In her affidavit, Brenda Laws recites the circumstances regarding the loan which enabled the debtor and his then wife to purchase the 1999 Chevrolet from Sherwood Chevrolet Company. Ms. Laws states that:

The Credit Union relied on Sherwood to prepare the documentation such that the title would show a lien to the Credit Union which Sherwood failed to do.

In the latter part of the year 2000, Mr. Arrington came to the Credit Union and advised that he and his wife had gotten a divorce and that as a part of the divorce settlement his wife, Colleen Arrington was to receive the 1999 Model Chevrolet Motor Vehicle, which was listed on the security agreement (Exhibit "A"). When Credit Union personnel reviewed the file for the purpose of allowing such transfer, it was recognized that they had failed to get the lien of Credit Union on the title. The Credit Union permitted the transfer

of title to Colleen Arrington and at that time obtained the notation of lien of Credit Union on the title.

The trustee has not responded to the defendant's summary judgment motion although the time for doing so, specified in the court's July 31, 2002 order, has expired. Under E.D. Tenn. LBR 7007-1, "[a] failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Due to the trustee's lack of response to the defendant's summary judgment, this court accepts the factual statements set forth in the affidavits as undisputed. Therefore, the only issue is whether these facts entitle the defendant to judgment as a matter of law. See Fed. R. Civ. P. 56(e) ("If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 n.5 (6th Cir. 1992)(citing *Littlejohn v. Larson*, 891 F.2d 291 (6th Cir. Dec. 6, 1989)(summary judgment was proper where plaintiff failed to

respond to defendant's motion for summary judgment and therefore no genuine issue of material fact existed)).

Applying the requirements of § 547(b) to the facts of the present case, it is clear that summary judgment in favor of the defendant is appropriate. Section 547(b) of the Bankruptcy Code provides that "the trustee may avoid any transfer of an interest of the debtor in property ... to or for the benefit of a creditor," made within 90 days prior to the filing of the petition, subject to certain other conditions being met. See 11 U.S.C. § 547(b). Thus, in order for a preferential transfer to take place, the debtor must have an interest in the property transferred. See *Milwaukee Cheese Wis., Inc. v. Bukowski* (*Matter of Milwaukee Cheese Wis., Inc.*), 164 B.R. 297, 303 (Bankr. E.D. Wis. 1993). "Essentially, a transfer is preferential only if it diminishes the fund to which other creditors can look for payment of their debts, thus making it impossible for similarly situated creditors to obtain as great a percentage as the favored creditor." *In re Messamore*, 250 B.R. 913, 916 (Bankr. S.D. Ill. 2000).

The debtor in this case made no transfer of his property to or for the benefit of the defendant within the 90 days preceding his bankruptcy filing; the only transfer to the defendant was by the debtor's former wife when the defendant perfected its

security interest in her automobile. Because the debtor's former wife rather than the debtor owned the automobile at time the defendant's lien was perfected, the transfer to the defendant (i.e., the lien perfection) did not diminish the debtor's bankruptcy estate. In other words, regardless of whether the transfer to the defendant occurred, the debtor's bankruptcy estate remains unaffected because the debtor no longer owned the automobile. *Id.* ("If a third party, such as a surety or guarantor, makes a payment [or a transfer] to a creditor of the debtor, there is no transfer of the debtor's property and, since the debtor's funds are not diminished, this transfer is not a preference.").

This court having concluded that there was no transfer of the debtor's property to the defendant within ninety days of the debtor's bankruptcy filing and therefore no preference under 11 U.S.C. § 547(b), the defendant is entitled to summary judgment in its favor. Accordingly, its motion is hereby granted and this adversary proceeding is dismissed.

SO ORDERED.

ENTER: September 17, 2002

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE